STATE OF MICHIGAN

COURT OF APPEALS

SHARON RUTH COTTRELL, Plaintiff-Appellee,	UNPUBLISHED November 1, 2002
V	No. 232787 Oakland Circuit Court
LARRY DOUGLAS COTTRELL, Defendant-Appellant.	LC No. 00-632844-DO

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We affirm in part, reverse in part, and remand.

Defendant contends that the trial court erred in ruling that all of the appreciation that accrued in the General Motors Stock Savings Plan ("GMSSP") during the marriage was part of the marital estate. Instead, defendant contends that the marital estate should only have included contributions made to the account during the marriage and the appreciation on those contributions.

We review a property distribution in a divorce by first reviewing the trial court's factual findings for clear error, and then determining "whether the dispositional ruling was fair and equitable in light of the facts." *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995). In determining whether the property distribution was fair and equitable, we consider the following:

> [T]he source of the property; the parties' contributions toward its acquisition, as well as to the general marital estate; the duration of the marriage; the needs and circumstances of the parties; their ages, health, life status, and earning abilities; the cause of the divorce, as well as past relations and conduct between the parties; and general principles of equity . . . [as well as] the interruption of the personal career or education of either party. [*Id.* at 292-293.]

Generally, a property distribution will be affirmed unless we are "left with the firm conviction that the distribution was inequitable." *Id.* at 292.

The property distribution only divides the "marital estate," those assets earned or acquired by a spouse during the marriage. See *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). In contrast, a spouse's separate assets are not subject to division. *Id.*

Here, defendant essentially contends that the original balance in the GMSSP account at the time of the marriage was a separate asset, and that any appreciation in the original balance was, therefore, a separate asset. Thus, defendant contends that only those contributions made during the marriage (and related appreciation on those contributions), were part of the marital estate. Defendant asserted that the contributions and appreciation totaled $124,000. However, our review of the record reveals that the commingling of the contributions made during the marriage with the original balance prevents any meaningful determination of how much appreciation could fairly be attributed to appreciation on either the original balance or the contributions during the marriage. Accordingly, it is far from clear that any part of the appreciation in the account during the marriage was a separate asset. Consequently, we do not believe that the trial court clearly erred in determining that only defendant's original balance was a separate asset.[1]

Defendant also contends that the trial court erred in rejecting his argument that the appreciation was "passive." In support of this contention, he notes that he did not manage the GMSSP, but delegated this responsibility to an investment manager. Indeed, we have held that the marital estate does not "include the appreciation in value of a party's premarital assets, if that appreciation was due to 'wholly passive' appreciation." *McNamara, supra* at 184. In *McNamara*, appreciation in a retirement plan was not found to be "wholly passive" because the parties made contributions to the plan during the marriage and commingled the funds. *Id.* at 184-185.

Here, as noted above, the contributions to the GMSSP during the marriage were commingled with the original balance. Moreover, because contributions were made, we are not persuaded that the GMSSP's appreciation may properly be deemed "wholly passive." Although defendant did not actively manage the investment decisions, the parties' regular contributions to the GMSSP were a significant activity. Consequently, relying on the *McNamara* decision, we reject defendant's contention that the trial court erred by deeming all of the GMSSP's appreciation during the marriage to be a marital asset. *McNamara, supra* at 184.

Defendant also challenges whether the trial court's distribution of the GMSSP was fair and equitable. Defendant makes a compelling argument that the short duration of the marriage, as well as defendant's substantially greater financial contribution to the GMSSP, should have entitled him to a larger share of the GMSSP. However, courts may also consider "the needs and circumstances of the parties" and the parties' "earning abilities." *Hanaway, supra* at 292-293.

[1] Regardless, even if the record accurately indicated the appreciation attributable to both the original balance and the contributions made during the marriage, it would not necessarily follow that all of the appreciation on the original balance was a separate asset. Indeed, it is possible that the contributions made during the marriage were conservatively invested, thereby allowing the original balance to be invested aggressively. If so, the most equitable result would be to allow both spouses to share the appreciation that their marital income contributed to, albeit indirectly.

Here, defendant has a far superior income earning ability than plaintiff, and he has substantial "separate" assets to provide for his long-term financial security. In contrast, plaintiff has few assets and must use those assets merely to survive. Further, although it was defendant's earnings that financed the GMSSP, it was not defendant's efforts that led to the appreciation. Instead, as defendant emphasized, it was the investment manager's sound strategy, supplemented by favorable economic conditions and perhaps even some luck, that led to the appreciation. We see no reason why the parties should not equally benefit from this good fortune that occurred during their marriage. Accordingly, we are not left with a firm and definite conviction that the property distribution was inequitable. *Id.* at 292.

Next, defendant contends that the trial court erred when it did not honor the parties' stipulation that the pontoon boat had no net value. However, although the trial court found that the pontoon boat's *value* was approximately $12,000, the trial court did not find that the pontoon boat's *net value* was $12,000. Accordingly, it is not clear that the trial court failed to honor the parties' stipulation. Regardless, it is well established that a property distribution need not be mathematically equal to be equitable. *Byington v Byington*, 224 Mich App 103, 114-115; 568 NW2d 141 (1997). Here, defendant does not contend that including the pontoon boat's value, rather than its net value, rendered the overall property distribution inequitable. Consequently, we reject defendant's contention of error.

Finally, defendant contends that the trial court erred when it awarded attorney fees to plaintiff. A trial court's decision to award attorney fees in a divorce action is reviewed for an abuse of discretion. *Stoudermire v Stoudermire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). In a divorce action, attorney fees are not recoverable as of right, but only where necessary to preserve a party's ability to carry on or defend the action. *Id.* Attorney fees may also be awarded if "the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992).

In the trial court's first opinion, it noted that plaintiff's attorney fees were approximately $12,000. However, the trial court declined to award plaintiff attorney fees because the property distribution would provide her sufficient assets to pay her attorney fees. In addition, the trial court found that neither party acted unreasonably during the course of litigation. Defendant filed a motion for rehearing, reconsideration, and relief from judgment challenging several of the trial court's rulings. Plaintiff's response to defendant's motion asked the trial court to award her attorney fees and costs in the amount of $2,500 to defend against the motion. Although the trial court partially granted defendant relief based on his motion, the trial court also awarded plaintiff $6,000 in attorney fees. The trial court based this award on "market fluctuations that will have an impact upon the amount of Plaintiff's distribution from Defendant's stock savings plan."

Here, plaintiff's request for attorney fees was based on her costs in defending against defendant's motion. Indeed, plaintiff titled her request as follows: "ATTORNEY FEES FOR THIS MOTION." However, because defendant partially prevailed on his motion, his motion was not unreasonable.

Plaintiff also argued that "if property is reconsidered resulting in a decrease of the award to Plaintiff, then attorney fees should be awarded." Plaintiff did not contend that she was unable to defend against defendant's motion absent an award of attorney fees. As noted above, attorney

fees are only available where "necessary to preserve a party's ability to carry on or defend the action." *Stoudermire, supra* at 344. In fact, the trial court did not accept this argument, but instead found that stock market decreases justified an award of attorney fees. However, to whatever extent that stock market fluctuations caused a decrease in plaintiff's assets, they also caused a similar decrease in defendant's assets. Accordingly, the stock market fluctuations did not cause plaintiff to be any more entitled to attorney fees than defendant. Consequently, we conclude that the trial court abused its discretion in awarding plaintiff attorney fees. *Stoudermire, supra* at 344.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens